SUPREME COURT OF THE UNITED STATES.

No. ~~191~~. 78

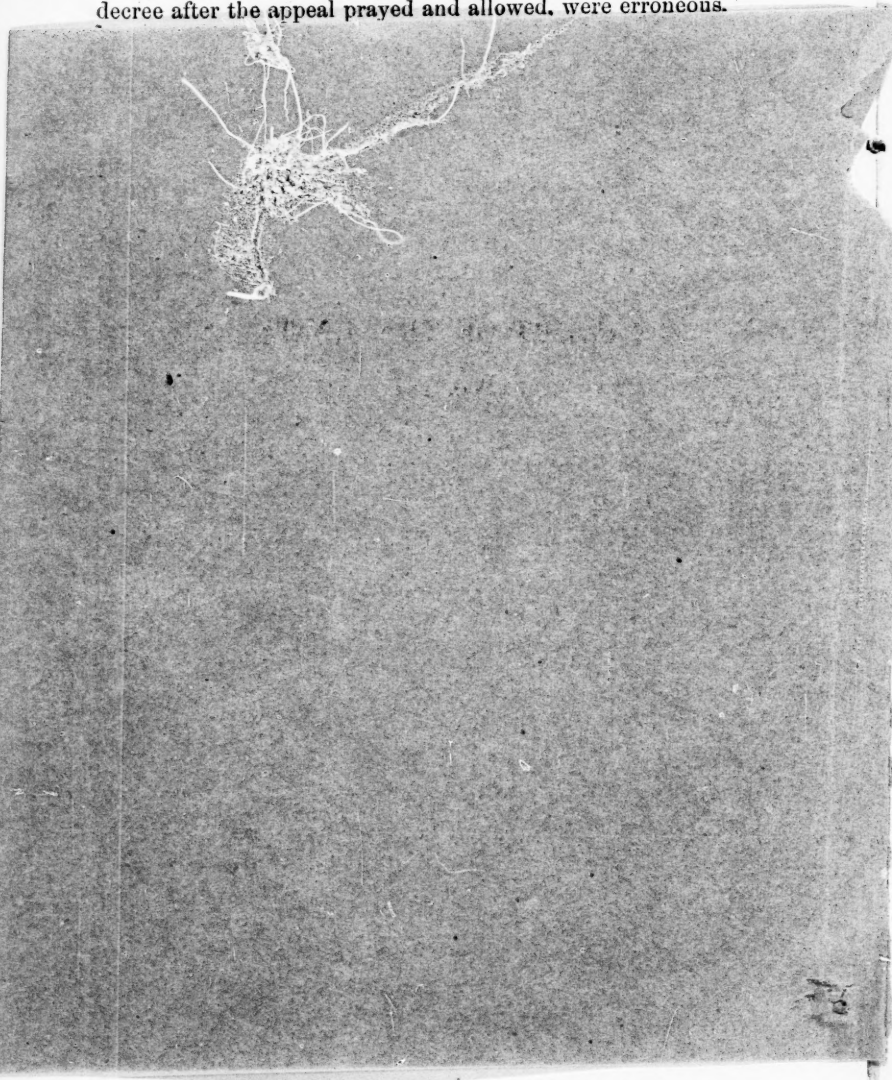
GARDNER P. DRURY, APPELLANT,

vs.

THOMAS FOSTER AND HANNAH C. FOSTER, HIS WIFE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

cited, to-wit: that all the proceedings in execution of the decree after the appeal prayed and allowed, were erroneous.



# SUPREME COURT OF THE UNITED STATES.

## No. 191.

GARDNER P. DRURY, APPELLANT,

vs.

THOMAS FOSTER AND HANNAH C. FOSTER, HIS WIFE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Citation and service | 1 | 1 |
| Bill of complaint | 4 | 2 |
| Answer of Foster and *ux* | 24 | 10 |
| Answer of Parker | 33 | 13 |
| Amendments to bill of complaint | 46 | 18 |
| Replication | 49 | 19 |
| Order for commission | 51 | 20 |
| Decree | 57 | 23 |
| Commission and return | 63 | 24 |
| Petition for appeal | 103 | 39 |
| Appeal | 105 | 39 |
| Transfer of record to circuit court for district of Minnesota | 107 | 41 |
| Clerk's certificate and seal | 108 | 41 |

1 UNITED STATES OF AMERICA, *ss:*

*To Thomas Foster and Hannah C. Foster, his wife, greeting:*

Whereas Gardner P. Drury has appealed to the Supreme Court of the United States from a part of a decree lately rendered in the district court of the United States for the district of Minnesota, in a cause therein pending wherein he, the said Gardner P. Drury was plaintiff, and you, the said Thomas Foster, and Hannah C. Foster, and one William L. Banning, were defendants, and has given the security required by law.

You are therefore hereby cited and admonished to be and appear before the said Supreme Court next, to be holden at the city of Washington, in the District of Columbia, on the first Monday in December next, and then and there to answer to said appeal, and to stand and abide such order and decree in the premises as to said court shall seem meet.

Witness the honorable Rensselaer R. Nelson, judge of the said district court for the district of Minnesota, at the city of St. Paul, in the said district, this 25th day of April, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of
2 the United States the eighty-sixth.

R. R. NELSON, *U. S. Judge.*

U. S. dist. court, district of Minnesota, Gardener P. Drury, pl'ff and appl't, *vs.* Thomas Foster *et al.* def'ts and ap'lees. Citation, filed April 25th, 1862, James W. Taylor, clerk; by J. W. Cardezo, dep'y. Hale and Bond, solicitors; Allis and Peckham, of counsel for pl'ff.

Service of within by copy admitted this 25 day of April, 1862.

Pr. C. D. GILFALLAN,
*Sol'rs for Comp'ts and Appellees.*

3 UNITED STATES OF AMERICA,
*District of Minnesota:*

GARDNER P. DRURY
*vs.*
THOMAS FOSTER, HANNAH C. FOSTER, his wife, WILLIAM L. BANNING and EDWARD F. PARKER. } In equity.

*Pleas.*

Before the honorable Rensselaer R. Nelson, judge of the district court of the United States for the district of Minnesota, of the October term thereof, held at Saint Paul, in and for said district, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

DISTRICT OF MINNESOTA, *ss:*

Be be remembered that on the (23d) twenty-third day of February, in the year of our Lord one thousand eight hundred and sixty-one, came Gardner P. Drury, by Hale & Bond, his solicitors and of
4 counsel, and filed in the clerk's office of said court, at Saint Paul in said district, his bill of complaint in the words and figures following, to wit:

*To the honorable the judge of the district court of the United States for the district of Minnesota, sitting in equity.*

Gardner P. Drury, of Boston, in the State of Massachusetts, and a citizen of the State of Massachusetts, brings this his bill of complaint against Thomas Foster and Hannah C. Foster, his wife, William L. Banning, and Edward F. Parker, all of the State of Minnesota and citizens of the State of Minnesota.

And thereupon your orator complains and says, that heretofore, to wit, on the twenty-seventh (27th) day of April, A. D. 1857, at Saint in the late Territory and present State of Minnesota, your orator loaned to said defendant Thomas Foster, at his instance and request, the sum of eight thousand five hundred dollars, lawful money of the United States.

That in consideration of said loan, and being indebted therefor, the said Thomas Foster then and there promised and agreed to re-
5 pay to your orator the said sum of eight thousand five hundred dollars, at the end and expiration of two years and one month from the said 27th day of April, A. D. 1857, and to pay your orator for the use of said sum interest thereon at the rate of twenty-five per centum per annum from and after the 21st day of May, A. D. 1857, with current rate of exchange on New York, the said interest to be paid semi-annually.

And your orator further shows, that the said Thomas Foster, at Saint Paul aforesaid, on or about the said 27th day of April, A. D. 1857, in consideration of said loan, and for the purpose of securing the payment of the same, and interest according to the terms of said agreement, made and delivered to your orator his five several promissory notes in writing, each bearing date at the time and place last aforesaid, by the first of which said notes he promised to pay to the order of your orator, two years and one month from the date thereof, without grace, for value received, eight thousand five hundred dollars; the same, if not paid at maturity, to draw interest at the rate
6 of twenty-five per centum per annum until paid; payable in Saint Paul, with current rate of exchange on New York.

The second of said notes was given to secure the first semi-annual instalment of interest, to wit, interest on the said sum of eight thousand five hundred dollars, at the rate of twenty five per cent. per annum, from the 21st day of May to the 27th day of November, A. D. 1857; in and by which note the said Thomas Foster promised to pay to the order of your orator, on the 27th day of November next,

meaning on the 27th day of November, 1857, without grace, for value received, one thousand, ninety seven and $\frac{50}{100}$ dollars; the same, if not paid at maturity, to draw interest at the rate of twenty five per cent. per annum until paid; payable in Saint Paul, with current rate of exchange on New York.

The third of said notes was given to secure the second semi-annual instalment of interest on said principal sum, to wit, interest on the same from the 27th day of November, A. D. 1857, to the 27th day of May, A. D. 1858; in and by which note the said Thomas Foster promised to pay to the order of your orator, on the twenty-seventh day of May, A. D. 1858, without grace, for value received, one thousand sixty-two and $\frac{50}{100}$ dollars; the same, if not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum
7 until paid; payable in Saint Paul, with current rate of exchange on New York.

The fourth of which notes was given to secure the third semi-annual instalment of interest, to wit, interest on said principal sum from the 27th day of May to the 27th day of November, A. D. 1858; in and by which note the said Thomas Foster promised to pay to the order of your orator, on the twenty-seventh day of November, 1858, without grace, for value received, one thousand sixty-two and $\frac{50}{100}$ dollars, the same, if not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid; payable in Saint Paul, with current rate of exchange on New York.

The fifth of which notes was given to secure the fourth semi-annual instalment of interest, to wit, interest on said principal sum from the 27th day of November, 1858, to the 27th day of May, 1859; in and by which note the said Thomas Foster promised to pay to the order of your orator, on the twenty-seventh day of May, 1859, without grace, for value received, one thousand sixty-two and $\frac{50}{100}$ dollars, the same, if not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid; payable in Saint Paul, with current rate of exchange on New York.

8 And your orator further shows, that to further secure the payment of the principal and interest mentioned in the said five promissory notes, according to the conditions thereof, and of said agreement, the said Thomas Foster and Hannah C. Foster, his wife, did, on the said 27th day of April, A. D. 1857, duly and jointly execute, under their hands and seals, and acknowledge and deliver to your orator a mortgage deed, bearing date on the day and year last aforesaid; whereby they granted, bargained, sold, and conveyed unto your orator, and to his heirs and assigns, forever, all that tract or parcel of land, with the appurtenances, lying and being in the county of Dakota, in the then Territory and present State of Minnesota, described as follows, to wit:

Lots six, (6) and seven, (7,) and the southwest quarter of the southeast quarter of section No. twenty-seven, (27,) in township No. one hundred and fifteen (115) north, of range No. seventeen (17) west, in the Red Wing land district, the said property then, and at the present time, being the property of the said Hannah C. Foster.

And the said mortgage was, on the 25th day of May, A. D. 1857, at ten o'clock in the forenoon, duly recorded as a mortgage in
9 the office of the register of deeds in and for the said county of Dakota, in book "D" of mortgages, on pages one hundred and eighty-eight, one hundred and eighty-nine, and one hundred and ninety, as by the said mortgage and the certificates of acknowledgement and of recording as aforesaid, endorsed thereon, and ready to be produced as your honor shall direct, will more fully appear.

And your orator further shows, that the said mortgage, grant and conveyance, aforesaid, was upon the condition that if the said mortgagors, their heirs, executors, administrators or assigns, should well and truly pay, or cause to be paid to your orator, his heirs, executors, administrators or assigns, the principal and interest mentioned in said five promissory notes, according to the conditions thereof, then the said mortgage, grant and conveyance, should be null and void; otherwise to be and remain in full force and effect.

And that your orator is now the lawful owner and holder of said five promissory notes, and of said mortgage; that he has demanded the payment of said notes of said Thomas Foster, since the maturity thereof, but that the same have not been paid, or any part
10 thereof; and that there is now due and owing to your orator thereupon the sum of twelve thousand seven hundred and eighty-five dollars and forty cents, with interest on the sum of eight thousand five hundred dollars, from the 27th day of May, A. D. 1859, and interest on the sum of one thousand ninety-seven dollars and ninety cents, from the 27th day of November, A. D. 1857, and interest on the sum of one thousand sixty-two dollars and fifty cents, from the 27th day of May, A. D. 1858, and interest on the sum of one thousand sixty-two dollars and fifty cents, from the 27th day of November, A. D. 1858, and interest on the sum of one thousand sixty-two dollars and fifty cents, from the 27th day of May, A. D. 1859, according to the terms of said five promissory notes, with the exchange on said sums in said notes mentioned at the rate of six per centum, and your orator shows that six per centum is the current rate of exchange at Saint Paul on New York.

And that no proceedings at law have been had for the recovery of the moneys secured by said notes and mortgage, or for any part thereof.

And your orator further shows, that there was assessed and levied upon the mortgaged premises hereinbefore described, by the proper authorities, for State and county taxes thereon, for the year
11 1857 the sum of forty dollars and forty-two cents, for the year 1858 the sum of fifty-seven dollars and seventy-nine cents, and for the year 1859 the sum of twenty-nine dollars and sixty-four cents; and that said mortgaged premises, on the 17th day of December, 1858, were sold for said taxes, for the year 1857; and on the 9th day of May, 1859, were sold for said taxes, for the year 1858; and at each of said sales the said premises were purchased by and in the name of the said county of Dakota, and the certificates of such sale and purchases were duly given to said county by the treasurer thereof.

And that on the 28th day of December, 1860, your orator purchased of said Dakota county the said tax certificates and took an assignment thereof from said county, and now owns and holds the same; and that your orator, on the said 28th day of December, 1860, also paid to the treasurer of said county of Dakota the sum of twenty-nine dollars and sixty-four cents for the above-named taxes on said mortgaged premises for the year 1859, and now holds the treasurer's receipt therefor.

And your orator further shows that there was assessed and levied by the authorities of the city of Hastings, in said county of Dakota, as a city tax upon the different portions of said mortgaged
12 premises respectively, the following sums and for the following years, viz: On lot six (6) of said premises, the sum of eight dollars and fourteen cents, for the year 1858. And on lot seven (7) of said premises, the sum of twenty-one dollars and seventy-four cents, for said year 1858. On the southwest ($\frac{1}{4}$) quarter of the southeast quarter ($\frac{1}{4}$) of section twenty-seven (27) in township one hundred and fifteen (115) north, of range seventeen, (17,) the sum of twelve dollars and eighty cents, for the year 1858, and the sum of three dollars and forty cents for the year 1859. And on said lots six and seven (6 & 7) for the year 1859, the sum of four dollars and seventy cents.

And that on or about the 23d day of December, 1858, the said mortgaged premises, and the different portions thereof, were sold by the authorities of the said city of Hastings for the said city taxes assessed and levied thereon for the year 1858, as aforesaid, and were again sold by the said authorities, on or about the 10th day of February, 1860, for the said city taxes assessed and levied thereon for the year 1859, as aforesaid, and at each of said sales the said mortgaged premises were purchased by and in the name of said city of Hastings, and the certificates of such sale and purchase
13 were thereupon given to said city by the tax collector thereof, except the said sale for the tax for the year 1859, upon the southwest quarter of the southeast quarter of said section twenty-seven, (27,) which was made to John Kennedy, and a certificate was given to him as the purchaser thereof for said tax.

And your orator further shows that after said sales, and prior to the 28th day of December, 1860, one Edward F. Parker, defendant above named of said city of Hastings, purchased of said city the tax certificates above mentioned, upon said lots six and seven (6 & 7) for said city taxes for the years 1858 and 1859, and took an assignment of said certificates from said city.

And that on the 28th day of December, 1860, your purchased of said city and of said John Kennedy the said tax certificates upon said southwest quarter of the southeast quarter of section twenty-seven (27) in township one hundred and fifteen (115) north, of range seventeen, (17,) for said taxes thereon for the years 1858 and 1859, and took from said city and from said John Kennedy an assignment thereof, and now owns and holds the same.

And that on the said 28th day of December, 1860, at the said

14 city of Hastings, your orator being then and there ready and willing to pay all taxes upon said mortgaged premises, offered and tendered to the treasurer of said county of Dakota, the proper officer to receive the same, and as he had a right to do by the charter of said city, the principal and interest which was then due for city taxes upon said lots six and seven (6 & 7) for the years 1858 & 1859, and the amount due upon said certificates of sale for said years, assigned by said city to said Edward F. Parker as aforesaid, in order to redeem said premises from said tax sales, as he had a right to do, but the said treasurer then and there refused and still does neglect and refuse to receive the same and to allow your orator to redeem said premises from said tax sales as your orator ever has been and now is ready and willing to do.

And your orator further shows that on some day prior to said 28th day of December, 1860, the said city of Hastings, by its clerk, executed and delivered to said Edward F. Parker a tax deed for said lots six and seven, (6 & 7,) purporting to convey said lots to said Parker in fee simple, on account of the non-payment of said city tax thereon for the year 1858. And that on the 29th day of December, 1860, the said deed was recorded in the office of the register
15 of deeds of said Dakota county in book "N," of deeds, on pages 378, 379, 380 and 381.

And that at the time said deed was recorded, as aforesaid, the State and county taxes upon the said lots six and seven, (6 & 7,) for the years 1857 and 1858, had not been, and have not since been paid, and the same then were and still remain a lien thereon in favor of your orator; and the said deed was recorded contrary to law and in fraud of the rights of your orator, and for the purpose of defeating the lien and security of his said mortgage.

And your orator further says that, on the 18th day of January, 1861, your orator, at the said city of Hastings, caused to be drafted and prepared, ready for execution by said Edward F. Parker and Cynthia A. Parker, his wife, to your orator, a quit claim deed of said lots six and seven, (6 & 7;) and your orator, by his agent duly authorized thereto, then and there offered and tendered to said Edward F. Parker the sum of sixty dollars, ($60,) in gold coin of the United States of America, for the redemption of said lots six and seven (6 & 7) from said tax sales for the said city taxes, for the years 1858 and 1859, being then and there ready and willing
16 to pay the same. And at the same time and place presented to said Edward F. Parker the said deed, drafted and prepared as aforesaid, and demanded the execution of the same, but the said Parker failed and refused to receive said money, or to execute the said deed; and your orator is now ready and willing to pay the said sixty dollars, or such other sum as may be due for the redemption of said lots six and seven, (6 & 7,) and offers to pay the same into court or otherwise, as your honor may direct.

And your orator further states that he claims as a lien upon said mortgaged premises, in addition to his said mortgage, the sums of money paid by him, as aforesaid, for taxes upon said premises, and

for the redemption of the same from said tax sales, and interest on said sums according to the said tax certificates and the receipt of said treasurer, ready to be produced as your honor shall direct.

And that the tax deed to said Edward F. Parker, above mentioned, ought not and does not legally or in justice convey any title or interest in the said lots six and seven, which said lots are a large and valuable part of the premises described in said mortgage, to
17 wit, about seventy-eight and eighteen hundredths acres thereof, the whole of said mortgaged premises amounting to one hundred and eighteen and $\frac{83}{100}$ acres, more or less.

And that your orator fears and verily believes that there is great danger that the said Edward F. Parker will, unless restrained and enjoined from so doing by your honor and the writ of injunction of this court, convey the said mortgaged premises, and thereby harass and embarrass your orator in the foreclosure of his said mortgage, and cause him great trouble, litigation and expense in asserting and obtaining his rights in the premises; and that the said Thomas Foster is wholly insolvent, and of no pecuniary responsibility, and the said mortgage is the only security which your orator has for the payment of the above sums of money loaned by him as aforesaid.

And that the aforesaid defendant, William L. Banning, has, or claims to have, some interest in the said mortgaged premises, or some part thereof, as subsequent purchaser, incumbrancer or otherwise.

To the end, therefore, that the said defendants may, if they
18 can, show why your orator should not have the relief hereby prayed, and may, without oath, their answers under oath being hereby waived, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to all and singular the premises aforesaid.

And that the said tax deed, executed as aforesaid by the city of Hastings, by its officer aforesaid, to said defendant, Edward F. Parker, may be adjudged and decreed null and void, and the said conveyance set aside, cancelled and discharged of record; and that your orator may be allowed to redeem said lots six and seven from said tax sales for the city taxes, for the years 1858 and 1859; and that the said defendant, Edward F. Parker, his agents and attorneys, in the mean time may be restrained and enjoined from selling, conveying, disposing of, or in any way incumbering said lots six and seven, (6 & 6,) or any portion thereof.

And that the usual decree may be made for the sale of the said mortgaged premises, and for the payment of the amount due and to become due to your orator, for the principal and interest afore-
19 said, and said taxes paid as aforesaid, and the costs and disbursements of this suit.

And that the said defendants and all persons claiming under them, or either of them, subsequent to the commencement of this suit, and all persons who have any lien thereon by judgment, decree, or otherwise subsequent to the commencement of this suit, may be forever

barred and foreclosed of and from all right and equity of redemption, and of all interest and lien in and upon said mortgaged premises and every part and parcel thereof.

And that the said Thomas Foster may be decreed and directed to pay to your orator any balance of the principal or interest and taxes paid as aforesaid, that may remain unsatisfied after the sale of said mortgaged premises as aforesaid, and the application of the moneys arising from said sale, properly applicable thereto, to the payment of the same.

And that your orator may have such other or further relief, or both, in the premises as the nature of the case may require, and as may be agreeable to equity.

May it please your honor to grant unto your orator the writ
20 of subpœna of the United States of America, issued out of and under the seal of this court, to be directed to the said defendants, Thomas Foster and Hannah C. Foster, his wife, William L. Banning, and Edward F. Parker, commanding the said defendants, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honor in this court, and then and there stand to and abide such order and decree therein as to your honor shall seem meet.

And your orator shall ever pray, &c.

HENRY HALE & S. R. BOND,
*Solicitors for Complainant.*
H. R. BIGELOW,
*Of counsel for Complainant.*

SAINT PAUL, *February* 21, 1861.

And thereupon a writ of subpœna was duly issued in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
*District of Minnesota:*

The President of the United States of America to Thomas Fos-
[SEAL.] ter, Hannah C. Foster, his wife, William L. Banning, and Edward F. Parker, greeting:

21 You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Minnesota, in our court of chancery in and for the district aforesaid, on the first Monday of April next ensuing, at the city of St. Paul in said district, to answer to a bill of complaint exhibited against you in our said court by Gardner P. Drury.

And to do further and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Thomas Foster and wife, William L. Banning, and Edward F. Parker, if to be found in his district, and due return thereof make.

Witness the Hon. Rensselaer R. Nelson, judge of the said district court of the United States, at the city of Saint Paul, in the said district of Minnesota, this twenty-third day of February, in the
22 year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-fifth.

GEO. W. PRESCOTT, *Clerk.*

HENRY HALE & S. R. BOND,
*Plaintiff's Solicitors.*

MEMORANDUM.—The defendants served in this action are hereby notified to enter their appearance in this suit, in the clerk's office at said Saint Paul, on or before the day and time at which this subpœna is returnable, as aforesaid, otherwise the bill filed may be taken as confessed.

Which said process of subpœna was duly tested, signed, and sealed with the seal of our said court.

And which said process of subpœna was subsequently returned to the said clerk's office by the marshal of the district of Minnesota, and by William Smith, his deputy, endorsed as follows, to wit:

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I served the within subpœna upon Thomas Foster and Hannah C. Foster, his wife, by delivering a certi-
23 fied copy of the same to Thomas Foster at Saint Paul, in said district, Feb. 23, 1861, and served the same upon Wm. L. Banning, by delivering to him a certified copy thereof, at Saint Paul, in said district, March 5th, 1861.

WM. B. GERE, *U. S. Marshal.*

Served the within subpœna upon Edward F. Parker, by delivering to him a certified copy thereof, at Hastings, in said district, Feb. 8th, 1861.

WM. B. GERE, *U. S. Marshal.*
By WM. SMITH, *Deputy.*

Fees—$15 50.

And afterwards, to wit, at rules held in the said clerk's office, at said Saint Paul, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-one, came the said defendants, Thomas Foster and Hannah C. Foster, his wife, and Edward F. Parker, by J. & C. D. Gilfillan, their solicitors, and the said defendant, William L. Banning, by Henry J. Horn, his solicitor, and on motion of said solicitors it is ordered that the appearance of said defendants be, and it is hereby, entered.

And afterwards, to wit, on the first day of April, in the year
24 one thousand eight hundred and sixty-one, came the said defendants, Thomas Foster and Hannah C. Foster, his wife, by their solicitor, C. D. Gilfillan, and filed in said clerk's office their answer to the said bill of complaint, in words and figures following, to wit:

DISTRICT COURT OF THE UNITED STATES,
*For the District of Minnesota, in Equity:*

The joint answer of Thomas Foster and Hannah C. Foster, defendants to the bill of complaint of Gardner P. Drury, against Thomas Foster and Hannah C. Foster, his wife, William L. Banning, and Edward F. Parker, defendants.

These defendants, Thomas Foster and Hannah C. Foster, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or to so much, or such parts thereof, as they are advised is material for them to make answer unto, they answer and say:

That they admit that the complainant loaned to the defendant,
Thomas Foster, the sum of eight thousand five hundred dollars
25 upon the terms stated in said bill of complaint, and that said
Thomas made and delivered to said complainant the several promissory notes in said bill mentioned and described, and upon the conditions and terms and for the purpose therein mentioned.

But they deny that said money was loaned or said notes or any or either of them were made on the 27th day of April, 1857, or at any other time than on the 21st day of May, 1857.

And they deny that the defendant Hannah C. ever, either jointly with the defendant Thomas or separately, executed under her hand or seal, or acknowledged or delivered to the said complainant or any other person, the mortgage deed mentioned and described in said bill of complaint, or any other mortgage deed, upon the real estate mentioned and described in said bill of complaint, or any part thereof.

But these defendants aver the fact to be, that on the 27th day of April, 1857, these defendants were husband and wife, and the defendant Hannah C. was and ever since has been and now is the owner, in fee simple, in her own right, as her separate estate and property,
of the whole of the real estate mentioned and described in com-
26 plainant's said bill of complaint; and on or about said day the
defendant Thomas proposed and intended to borrow upon mortgage of said real estate the sum of six or seven hundred dollars, and proposed to the defendant Hannah C. that she should execute with him a mortgage upon said real estate for the purpose of procuring such loan. That on said day a paper was prepared by said Thomas in the form of a blank mortgage deed by these defendants upon said real estate, but without any name of any grantee or mortgagee, or consideration or sum of money, or time of payment or condition being stated therein, which said paper, on said 27th day of April, 1857, at Hastings, in the county of Dakota and Territory of Minnesota, was brought to said defendant Hannah C. by one A. M. Hayes, then a notary public in and for said territory, who then and there presented the same to said Hannah C., and importuned and solicited her to sign her name to and acknowledge the same; and thereupon, she supposing that the same was to be used only for the purpose of procuring a loan of six or seven hundred dollars, as afore-

said, did sign her name to and acknowledge the same before said notary public, and said A. M. Hayes and one other person
27 did subscribe the same as attesting witnesses thereto, and said Thomas in like manner did then and there sign his name to and acknowledge the same.

And thereupon said notary public wrote and signed in due form of law the usual certificate of acknowledgment upon said paper, the said paper being then and there in blank as aforesaid.

And afterwards, to wit, on the 21st day of May, 1857, at the city of Saint Paul, in the county of Ramsey in said territory, the defendant Thomas negotiated with the complainant the loan of the sum of money mentioned in said bill of complaint, and in such negotiation, on said day, at Saint Paul aforesaid, the said paper in blank as aforesaid being in his possession, the defendant Thomas, without the knowledge, privity, or consent of the defendant Hannah C., delivered the same to the complainant, and then and there, either immediately before or immediately after such delivery, and whether immediately before or immediately after these defendants cannot now positively state, some person other than either of these defendants, but who the defendant Thomas does not now recollect, and the defendant Hannah C.
28 never knew, and does not now know, without the knowledge, privity, or consent of the said defendant Hannah C., filled the said blanks in said paper by writing and inserting therein the name of the said complainant as grantee or mortgagee, with his place of residence, and the sum of twelve thousand seven hundred and eighty-five dollars and forty cents, as the consideration, and the condition that the same should become void if these defendants should well and truly pay or cause to be paid to the said complainant, his heirs, executors, administrators or assigns, the said sum of twelve thousand seven hundred and eighty-five dollars and forty cents, according to the conditions of five promissory notes of said Thomas bearing even date therewith, otherwise to be and remain in full force and effect.

That there were no subscribing witnesses to said delivery, nor to the filling up of said blanks as aforesaid; and the execution of said paper was never, after such delivery or filling up of said blanks, acknowledged by the defendant Hannah C.

And said paper never was delivered to said complainant or any other person by the defendant Hannah C., nor by any person for her or by her authority to deliver the same as a deed or mortgage. And the said blanks in said paper were not filled up as aforesaid
29 by her or by any other person with her authority, nor with her knowledge, privity, or consent. And said paper was not delivered to said complainant nor said blanks filled up in her presence.

And she has never in any manner assented to, affirmed or ratified such delivery nor the filling up of said blanks, but at the time of such delivery and the filling up of such blanks, and at the time of loaning to defendant Thomas the money mentioned in said bill, the said complainant well knew that the defendant Hannah C. had not authorized any person to deliver said paper as a deed or mortgage

nor to fill up in any manner said blanks, and well knew that said blanks were not filled up until said 21st day of May, 1857, and well knew that the said blanks were not filled up by this defendant, Hannah C.

Nevertheless the said complainant did receive said paper and caused the same to be recorded at the time and place mentioned in said bill. And the said paper so made, delivered, filled up and recorded as aforesaid, is the same pretended mortgage deed mentioned and described in the said bill of complaint and none other or
30 different. And they admit that there is due on the promissory notes mentioned and described in said bill of complaint the sum of twelve thousand seven hundred and eighty-five dollars and forty cents, with interest at the rate of seven per cent. per annum on the several portions thereof from the respective times stated in said bill of complaint, and that the complainant is now the holder and owner of said notes and said pretended mortgage. And that no proceedings have been had at law to recover the moneys secured thereby.

And they admit that there was assessed and levied upon said real estate by the proper authorities for State and county taxes thereon, for the respective years in said bill of complaint mentioned the respective sums therein mentioned.

But they deny, on their information and belief, that said premises or any part thereof were ever sold for said taxes for either of the years in said bill mentioned. And they also deny, on their information and belief, that the complainant ever purchased from said county of Dakota any tax certificates for said real estate or any part thereof, or ever took an assignment thereof from said county, or now holds the same.

And they also deny, on their information and belief, that said
31 complainant ever paid the taxes for the year 1859, or any other year, or any part of said taxes on said real estate or any part thereof, or now holds the treasurer's receipt therefor.

And they admit that there was assessed and levied by the authorities of said city of Hastings, as a city tax upon the different portions of said premises, respectively, the respective sums and for the respective years in said bill of complaint mentioned. And they also admit that said premises and the different portions thereof were, at the several dates in said bill mentioned, sold for the city taxes for the respective years therein mentioned; and that on said sales the respective portions of said real estate were sold to the respective persons therein named.

But they deny, on their information and belief, that the complainant ever purchased or took an assignment from said city of Hastings or said John Kennedy, the tax certificates or any of them in said bill mentioned.

And these defendants therefore pray that the said bill of complaint may be dismissed as to the defendant Hannah C. Foster, and that she

may have and recover her costs and disbursements herein, and
32 such other or further relief as to this honorable court shall seem meet and proper.

THOMAS FOSTER.
HANNAH C. FOSTER.
C. D. GILFILLAN,
*Solicitor for defendants, Thomas and Hannah C. Foster.*
JAMES GILFILLAN,
*Of Counsel.*

SAINT PAUL, *March 31st*, 1861.

STATE OF MINNESOTA,
*County of Ramsey, ss:*

I, James Gilfillan, a counsellor of the within-named court, and of counsel for the defendants, Thomas and Hannah C. Foster, in the within entitled action, do hereby certify that the within answer was subscribed by each of said defendants in my presence.

JAMES GILFILLAN, *Counsel.*

Dated St. Paul, April 1st, 1861.

And afterwards, to wit, on the said first day of April, in the year one thousand eight hundred and sixty-one, came the said defendant, Edward F. Parker, by his solicitors, and of counsel J. & C.
33 D. Gilfillan, and filed in said clerk's office, at said Saint Paul, his answer to the said plaintiff's bill of complaint, in the words and figures following, to wit:

District court of the United States for the district of Minnesota.—In equity.

The separate answer of Edward F. Parker, defendant, to the bill of complaint of Gardner P. Drury against Thomas Foster, Hannah C. Foster, his wife, William L. Banning, and Edward F. Parker, defendants.

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or so much or such parts thereof as he is advised is material for him to make answer unto, he answers and says:

That he admits that the complainant loaned to the defendant, Thomas Foster, the sum of eight thousand five hundred dollars, upon the terms stated in the said bill of complaint; and that said
34 Thomas Foster made and delivered to complainant the several promissory notes in said bill mentioned and described, and upon the conditions and terms and further purpose therein mentioned.

But he denies, on his information and belief, that said money was loaned or said notes or any or either of them made on the 27th day

of April, 1857, or at any other time than on the 21st day of May, 1857.

And he denies, on his information and belief, that the defendants, Thomas Foster and Hannah C. Foster, or either of them, ever executed or acknowledged or delivered to said complainant the mortgage deed mentioned and described in said bill of complaint, or any other mortgage deed upon the real estate mentioned and described in said bill, or upon any part thereof, for any purpose or upon any condition whatsoever.

But he admits that a pretended mortgage deed, purporting to be as described in said bill of complaint, was recorded at the time and place therein mentioned.

35 And he admits that there is due on the notes mentioned and described in said bill the sum of twelve thousand seven hundred and eighty-five dollars and forty cents, with interest at the rate of seven per cent. per annum on the respective sums thereof as stated in said bill, and that said complainant is now the holder and owner of said notes and said pretended mortgage, and that no proceedings have been had at law for the recovery of the moneys secured by said notes.

And he denies on his information and belief that there was assessed or levied upon the premises described in said bill of complaint, or upon any part thereof, by the proper authorities for State and county, or for State or county taxes thereon, for the year 1857, the sum of forty dollars and forty-two cents, or any other sum, or for the year 1858, the sum of fifty-seven dollars and seventy-nine cents, or any other sum; or for the year 1859, the sum of twenty-nine dollars and sixty-four cents, or any other sum.

And he denies, on his information and belief, that the said premises, or any part thereof, were, on the 17 day of December, 1858, or at any other time, sold for taxes for the year 1857, or any other year;

36 or that said premises, or any part thereof, were, on the 9th day of May, 1859, or at any other time, sold for taxes for the year 1858, or any other year; or that said premises, or any part thereof, were purchased by or in the name of said county of Dakota, or that any certificates of such sale were ever given to said county by the treasurer thereof.

And he denies, on his information and belief, that the said complainant ever purchased of said county any tax certificates, or took an assignment of such tax certificates, or now holds the same.

And he denies, on his information and belief, that the complainant ever paid the taxes on said premises, or any part thereof, for the year 1859, or any part thereof, or holds the treasurer's receipt therefor; and he admits that there was assessed and levied by the authorities of the city of Hastings, in said county of Dakota, as a city tax upon the different portions of said premises, the respective sums and for the respective years mentioned in said bill. And he also admits that said premises and the different portions thereof were sold by the authorities of the said city of Hastings for the said city taxes

37 for the year and at the times in said bill stated, and that at eac hof said sales mentioned in said bill said premises were

purchased by and in the name of the said city of Hastings, and the certificates of said sales were given to said city by the tax collector thereof, except the said sale for the year 1859, upon the southwest quarter of the southeast quarter of said section twenty-seven, (27), and that the sale of that portion for that year was made and the certificate thereof given to John Kennedy.

And he admits that after said sales, and prior to the 28th day of December, 1860, this defendant purchased of said city the tax sale certificates above mentioned upon said lots six (6) and seven (7) for the sales for said city taxes for the years 1858 and 1859, and took an assignment of said certificates from said city.

And he denies, upon his information and belief, that on the 28th day of December, 1860, or on any other day, the said complainant tendered or offered to the treasurer of the county of Dakota, the principal and interest then due for city taxes on said lots six (6) and seven. (7), or either of them, for the years 1858 and 1859,
38 or either of said years, or the amounts due upon said certificates of sale, or either of them or any portion thereof.

And he admits and avers the fact to be, that prior to the 28th day of December, 1860, to wit, on the 13th day of February, 1860, the said city of Hastings, by its clerk, executed and delivered to defendant a tax deed for said lots six (6) and seven, (7), conveying said lots to this defendant in fee simple on account of the non-payment of the said city tax for the year 1858, and of the said sale of said lots for said tax, and that on the 29th day of December, 1860, the said deed was recorded in the office of the register of deeds of said county of Dakota, in book "N" of deeds, on pages 378, 379, 380, and 381, and that at said date all State and county taxes upon said lots had been fully paid.

And he denies that the State and county taxes, or either of them, for the years 1858 and 1859, or either of said years, or for any other year, then were or remained a lien upon said lots or either of them. And he denies that said deed was recorded contrary to law, or in fraud of the rights of said complainant, or for the purpose of
39 defeating the pretended lien of said pretended mortgage.

And this defendant admits that on the 18th day of January, 1861, the complainant presented to this defendant the deed mentioned in said bill, and then tendered to him, as alleged in said bill, the sum of sixty dollars in gold coin of the United States, and demanded the execution by this defendant of said deed, and that this defendant refused to receive said money or execute said deed.

And he denies that at the time when, as the complainant in his said bill charges and pretends, he tendered and offered to pay to the treasurer of said county the principal and interest due for city taxes upon said lots, and the amount due upon said certificates; that is to say, on the 28th day of December, 1860, the complainant had any right by or under the charter of said city or otherwise to redeem said lots, or either of them, from said sale for city taxes for the year 1858, for the reason that the time prescribed in said charter for redemption from said sale had expired and passed long before said day,

and the said lots had long before said day been conveyed to
40 this defendant on account of such tax sale, pursuant to the provisions of the charter of said city, and he was then the absolute owner in fee simple of said lots.

And this defendant, further answering, avers that in and by the act of the legislature of the State of Minnesota, under and by virtue of which said city of Hastings was incorporated and exists as a city, to wit: An act entitled "An act to incorporate the city of Hastings, and to repeal a former charter," approved June the 22d. 1858; it is in chapter five of said act, which prescribes the conditions, manner, and terms of levying and assessing taxes, and of the sale of lands for taxes, and the redemption of such lands from such sales, provided as follows, to wit:

"Sect. 14. Any lots or tract of land may be redeemed by the owner thereof, his agent, or attorney, or by any other person having an interest therein, at any time within one year after the day of sale, by paying to the collector the amount for which the same was sold, including taxes and charges, together with interest thereon at the rate of thirty-six per cent. per annum, and the legal taxes and charges thereon since the time of sale."

"Sect. 15. Any such tax certificate shall be assignable by
41 endorsement, and the assignee thereof shall be entitled to a deed of the premises in such certificate described, in his own name, and with the same effect as though he had been the original purchaser."

"Sect. 16. And in case the city shall become the purchaser of any real estate at any tax sale, the city council may authorize the treasurer to sell the certificate issued therefor, for the amount paid therefor, with interest, and to endorse and transfer such certificate to the purchaser thereof."

"Sect. 24. And when there shall be a sale by the register of Dakotah county, or other county officer, and by the city collector of any lot or parcel of land for taxes in the same year, the purchaser of any such lot or parcel who shall be first in point of time, may redeem the same from the subsequent purchaser, and in case he shall not redeem, the last purchaser shall be held paramount, if he obtain a deed therefor."

"Sect. 26. When any lands sold for taxes shall not be redeemed as aforesaid, the clerk of said city shall, after the expiration of said term of one year for the redemption thereof, on the presentation to him of the certificate of sale and an order of the treasurer, execute in the name of the city of Hastings, under his hand and seal,
42 to the purchaser, his heirs and assigns, a deed of the lots or parcels of land so remaining unredeemed, and shall acknowledge the same, which shall vest in the grantee an absolute estate in fee simple of such lands."

And it is also in and by said act provided as follows, to wit:

"No general law of this State, contravening the provisions of this act, shall be considered as amending or modifying the same, unless such purpose be expressly set forth in such law."

And this defendant, further answering, says: That after the said sale of said lots, six (6 and seven (7,) for the said city taxes for the years 1858 and 1859, and the issuance to said city of said certificates therefor, to wit, on the 28th day of July, 1859, the city council of said city did, by ordinance duly passed by said council, authorize the treasurer of said city to sell the certificates of sale for any lands sold to said city for the city taxes of the year 1858 for the amount paid therefor, with interest, and to indorse and transfer such certificates to the purchasers thereof. And afterwards, to wit, on the 21st day of December, 1859, at said city, this defendant paid to the treasurer of said city the amount paid by said city for said lots
43 on said sale for city taxes for the year 1858, (being the amount of said taxes, interest, and charges on said lots,) with interest; and thereupon, then and there, said treasurer did, pursuant to the provisions of said act and of said ordinance, sell, transfer, and indorse to this defendant the said certificates on said sale of said lots for city taxes for the year 1858.

And afterwards, to wit, on the 13th day of February, 1860, the said lots and each of them then remaining unredeemed from said sale, and no person having offered to redeem the same, and more than one year having elapsed from the time of said sale for said city taxes for the year 1858, this defendant did, at said city, present to the clerk thereof the said certificates of said sale for said city taxes for the year 1858, and an order of said treasurer; and thereupon the said clerk did then and there, pursuant to the provisions of said act, execute, under his hand and seal, in the name of said city, and acknowledge the execution of, and deliver to this defendant the deed of said lots mentioned in said bill of complaint and hereinbefore men-
44 tioned, and this defendant thereby became and has ever since been and now is the owner in fee simple absolute of said lots, as by reference to said deed and the certificate of acknowledgment thereon, ready to be produced as this honorable court shall direct, will more fully appear.

And this defendant therefore prays this action may be, as against him, dismissed, with his costs and disbursements herein, and that he may have such other or further relief in the premises as to the law and justice shall appertain.

EDWARD F. PARKER.

ST. PAUL, *March 23d*, 1861.

C. GILFILLAN,
*Solicitor for defendant, Edward F. Parker.*
JAMES GILFILLAN,
*Of Counsel.*

STATE OF MINNESOTA,
*County of Ramsey, ss:*

I, James Gilfillan, a counsellor of the within-named court, and of counsel for the defendant, Edward F. Parker, in the within-entitled

cause, do certify that I know the handwriting of said Parker, and that the signature of said Parker subscribed to the within answer is his genuine signature.

JAMES GILFILLAN,
*Counsel.*

Dated ST. PAUL, *April 1st*, 1861.

45 And afterwards, to wit, at rules held in the clerk's office of said court, on the sixth day of May, in the year one thousand eight hundred and sixty-one, the following proceeding, among others, was had :

District court of the United States for the district of Minnesota.

GARDNER P. DRURY, plaintiff,
*vs.*
THOMAS FOSTER and WIFE, and others, defendants.

On reading and filing the plaintiff's petition in this cause for leave to amend his bill of complaint, and on motion of Hale & Bond, solicitors for said plaintiff—

It is ordered that the said plaintiff have leave to amend his said bill as prayed for in said petition, the costs thereof to abide the event of this cause.

R. R. NELSON,
*U. S. Dist. Judge.*

MAY 6th, A. D. 1861.

Attest : GEO. W. PRESCOTT, *Clerk.*

46 And afterwards, to wit, on the said sixth day of May, in the year one thousand eight hundred and sixty-one, came said plaintiff by his said solicitors, and Allis and Peckham, of counsel, and filed in said clerk's office, at said St. Paul, amendments to bill of complaint, in the words and figures following :

District court of the United States, for the district of Minnesota.

GARDNER P. DRURY, plaintiff,
*vs.*
THOMAS FOSTER and WIFE, *et als.* } In equity.

Amendments to the bill of complaint in this cause made pursuant to an order of the judge of this court, entered of the rule day of the first Monday of May, A. D. 1861, to wit, the 6th day of May, A. D. 1861.

1st. Strike out the name of "Edward F. Parker" from the introductory part of said bill, and also from the prayer for process of said bill.

2d. Strike out from the stating part of said bill, all the statements and matters commencing with and including the words "and your

orator further shows," in the ninth line of the seventh page of
47 said bill, and extending to and including the words "loaned by him as aforesaid," in the eighteenth line of the thirteenth page of said bill. That is to say, strike out from the stating part of said bill all that part of said bill intervening between the allegation that no proceedings at law have been had for the recovery of the moneys secured by said note and mortgage or of any part thereof, and the allegation that the aforesaid defendant, William L. Banning, has, or claims to have, some interest in the said mortgaged premises, or some part thereof, as subsequent purchaser, incumbrancer, or otherwise.

3d. Strike out from the prayer for relief of said bill all that portion thereof commencing and including the words "and that the said tax deed," in the fifth line of the fourteenth page of said bill, and extending to and including the words "lots six and seven, (6 & 7) or any portion thereof," in the seventeenth line of said fourteenth page of said bill; that is to say, all that portion of said prayer which asks for relief and an injunction against the said Edward F. Parker.

48 4th. Strike out from the prayer for relief of said bill the words "and said taxes paid as aforesaid," which are interlined in the twenty-second line of the fourteenth page of said bill; and also the words "and taxes as," which are interlined in the tenth line of the fifteenth page of said bill.

5th. Insert in the prayer for process of said bill the words "to answer all and singular the premises and," immediately after the words "then and there," in the last line of the fifteenth page of said bill, and immediately before the words "stand to and abide," in said prayer.

HALE & BOND,
*Solicitors for Plaintiff.*
ALLIS & PECKHAM,
*Of Counsel for Plaintiff.*

And afterwards, to wit, on the said sixth day of May, in the year of our Lord one thousand eight hundred and sixty-one, came the said plaintiff, Gardner P. Drury, by H. Hale & S. R. Bond, his solicitors, and filed in the clerk's office of said court, at said Saint Paul, his replication to the joint answer of the defendants, Thomas Fos-
49 ter and Hannah C. Foster, in the words following, to wit:

District court of the United States for the district of Minnesota.—In equity.

*The replication of Gardner P. Drury, complainant, to the joint answer of Thomas Foster and Hannah C. Foster, defendants.*

The repliant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said

answer, for replication thereunto, says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant without this: that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently
50 replied unto, confessed, and avoided, traversed or denied, is true: all which matters and things this repliant is, and will be, ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

H. HALE & S. R. BOND,
*Complainant's Solicitors.*

And afterwards, to wit, at rules held in the clerk's office of said court, on the fifth day of August, in the year of our Lord one thousand eight hundred and sixty-one, the following proceeding among others was had, to wit:

GARDNER P. DRURY
*vs.*
THOMAS FOSTER and HANNAH C. FOSTER, his wife, *et al.* } Original bill.

THOMAS FOSTER and HANNAH C. FOSTER, his wife,
*vs.*
GARDNER P. DRURY. } Cross-bill.

51 On motion of the solicitors in this cause, it is ordered that a commission to such person or persons as shall be named by the judge of this court, to take the testimony of such witnesses as shall be produced by the parties herein upon oral interrogatories by the solicitors of said parties, they hereby agreeing to take said testimony upon such interrogatories.

HALE & BOND,
*Sol's for Pl'ffs.*
C. D. GILFILLAN,
*Sol's for Def'ts.*

And afterwards, to wit, on the eighth day of August, in the year of our Lord one thousand eight hundred and sixty-one, at rules held in the clerk's office, the following proceeding among others was had, to wit:

GARDNER P. DRURY
*vs.*
THOMAS FOSTER, HANNAH C. FOSTER, his wife, and WM. L. BANNING. } Original bill.

52 THOMAS FOSTER and HANNAH C. FOSTER, his wife,
*vs.*
GARDNER P. DRURY. } Cross-bill.

On reading and filing the stipulation of the respective parties agreeing thereto, it is hereby ordered that the time for taking the proofs of the several parties upon the original bill and cross-bill in this cause be, and the same is hereby, extended to the 20th day of August, 1861.

That said original bill and cross-bill be heard together, and that proofs and pleadings in the one cause be read in the other, so far as admissible under the pleadings.

That a commission issue to George W. Prescott, esq., who is hereby appointed a commissioner to take the proofs of the several parties to said original and cross-bills upon oral interrogatories.

That the defendant in said cross-bill and his solicitors are hereby required to produce and deposit with said commissioner for the inspection of the complainants in said cross-bill, their solicitor, coun-
53 sel and witnesses, the mortgage described in said original bill and said cross-bill, and the answer thereto, at such time and place as shall be appointed by said commissioner for taking the proofs of said complainants on said cross-bill.

R. R. NELSON,
*U. S. Dis't Judge.*

A true record.
Attest: JAMES W. TAYLOR, *Clerk.*

And afterwards, to wit, on the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and sixty-one, at rules held in the clerk's office of said court, the following proceeding was had, to wit:

GARDNER P. DRURY
*vs.*
THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WILLIAM L. BANNING. } Original bill.

THOMAS FOSTER and HANNAH C. FOSTER, his wife,
*vs.*
GARDNER P. DRURY. } Cross-bill.

54 On filing the stipulation and agreement to that effect between Hale & Bond, solicitors for complainants in original bill and for defendant in cross-bill, and of C. D. Gilfillan, solicitor for defendants in original bill and for the complainants in cross-bill—

It is ordered that publication of the testimony taken in these causes do pass in the said clerk's office.

And afterwards, to wit, at rules held in said clerk's office on the fourth day of October, in the year one thousand eight hundred and sixty-one, the following proceeding was had:

GARDNER P. DRURY
*vs.*
THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WILLIAM L. BANNING. } Original bill.

THOMAS FOSTER and HANNAH C. FOSTER, his wife,
*vs.*
GARDNER P. DRURY. } Cross-bill.

And now comes the plaintiff in said original bill, by Allis
55 and Peckham, his counsel, and on their motion it is ordered that these causes be, and they hereby are, set down for hearing at the next term of this court, to wit, October term, 1861; and also ordered that the usual subpœna to hear judgment issue.

And afterwards, to wit, at a stated term of said court, held at Saint Paul, in and for the district of Minnesota, of the October term thereof, in the year one thousand eight hundred and sixty-one, on the ninth day of said term, the following proceeding, among others, was had, to wit:

GARDNER P. DRURY
*vs.*
THOMAS FOSTER, HANNAH C. FOSTER, his wife, WILLIAM L. BANNING, and EDWARD F. PARKER. } Original bill.

56 THOMAS FOSTER and HANNAH C. FOSTER, his wife,
*vs.*
GARDNER P. DRURY. } Cross-bill.

These causes this day came on to be heard upon the bills, answers, and testimony herein; whereupon Lorenzo Allis, esq., solicitor and of counsel for the plaintiff in the original bill and for the defendant in said cross-bill, moves the court to suppress such portions of the depositions on file in said causes as were received subject to objection for incompetency. And thereupon, upon consideration, it is ordered by the court that the motion heretofore made to suppress such portions of the depositions on file in these causes as were received subject to objection for incompetency be denied, and that said testimony be received.

And afterwards, to wit, on the nineteenth day of said term, the following proceeding, among others, was had:

57 GARDNER P. DRURY
*vs.*
THOMAS FOSTER and HANNAH C. FOSTER, his wife, WILLIAM L. BANNING and EDWARD F. PARKER. } Original bill.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, on consideration thereof, it was ordered, adjudged, and decreed as follows, to wit: That the plaintiff is entitled to the relief prayed for in his bill of complaint, except as to the defendant, Hannah C. Foster, wife of the said defendant, Thomas Foster, and as to her only said bill of complaint be dismissed out of court; that this cause be, and it is hereby, referred to James W. Taylor, who is a master in this court, to compute and report the amount now due the plaintiff upon the notes and mortgage in said bill set forth; that all and singular the mortgaged premises mentioned in the bill of complaint in this cause and hereinafter described, or so much
58 thereof as may be sufficient to raise the amount due the plaintiff for principal, interest, and costs in this cause, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of James W. Taylor, a master in this court; that said sale be made according to the rules and practice of this court; that said master give public notice of the time and place thereof by advertisement printed in some newspaper published in the city of Saint Paul, in said district, at least once in each week for six successive weeks immediately preceding the day of sale; that said plaintiff, or any of the parties to this cause, may become the purchaser thereof; that said master execute a deed or deeds to the said purchaser or purchasers of said mortgaged premises on such sale; that said master pay to said plaintiff or his solicitor out of the proceeds of said sale, after satisfying any liens upon said premises, his costs in this cause to be taxed, and also
59 such sum as shall be reported by said master due to him, and interest thereon from this date to the day of such sale, or so much thereof as the purchase-money of the mortgaged premises will pay, and file receipts for the same, with his report of sale, and that he bring the surplus money, if any there be, into court without delay, to abide the further order of the court; that the defendants, except the said defendant, Hannah C. Foster, wife of the said defendant, Thomas Foster, and all persons claiming under them, or either of them, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to the said mortgaged premises, and every part and parcel thereof; that the purchaser or purchasers of said mortgaged premises at such sale be let into the possession thereof, and that any of the parties to this cause who may be in possession of said premises, or any part thereof, except the said defendant, Hannah C. Foster, wife of the said defendant Thomas
60 Foster, and any person who, since the commencement of this cause, has come into possession under them, or either of them, except the said defendant, Hannah C. Foster, deliver possession thereof to such purchaser on the production of the deed of said mas-

ter, and a certified copy of the order confirming the report of sale in this cause; that if the moneys arising from such sale are insufficient to pay the amount due to the plaintiff for principal, interest, and costs, as aforesaid, that said master specify the amount of such deficiency in his report of sale, and that on the coming in and confirmation of said report the said defendant, Thomas Foster, who is personally liable for the payment of the debt secured by said mortgage, pay to the plaintiff the amount of such deficiency, with interest thereon from the date of such report, and that the plaintiff may have execution therefor.

The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, is as follows :

61 Situate in the State, then Territory, of Minnesota, and county of Dakota, to wit, lots six (6) and seven (7,) and the southwest quarter of the northeast quarter in section number twenty-seven, (27,) in township number one hundred and fifteen (15) north, of range number (17) seventeen west, in the Red Wing land office district.

R. R. NELSON, *U. S. Dist. Judge.*

63 And there are on file in this cause, and endorsed as filed on the 27th day of August, A. D. 1861, the commission and return thereto, and depositions and exhibits, in words following, to wit:

*The President of the United States of America to George W. Prescott, esq., greeting:*

You are hereby authorized and appointed to take the testimony, in writing, of such witnesses as may be produced before you in the above-named cases, on the original and cross-bills pending in the district court of the United States for the district of Minnesota before the judge thereof, pursuant to the following order, to wit:

"On reading and filing the stipulation of the respective parties agreeing thereto, it is hereby ordered:

64 "That the time for taking the proofs of the several parties upon the original bill and cross-bill in this cause, be, and the same is hereby, extended to the 20th day of August, 1861.

"That said original bill and cross-bill be heard together, and that proofs and pleadings in the one case be read in the other, so far as the same are admissible under the pleadings.

"That a commission issue to George W. Prescott, esq., who is hereby appointed a commissioner, to take the proofs of the several parties to said original and cross-bills upon oral interrogatories.

"That the defendant in said cross-bill, and his solicitors, are hereby required to produce and deposit with said commissioner for the inspection of the complainants in said cross-bill, their solicitor, counsel, and witnesses, the mortgage described in said original bill and said cross-bill, and the answer thereto, at such time and place as shall be ap-

pointed by said commissioner for taking proofs of said complainants on said cross-bill."

R. R. NELSON, *U. S. Dist. Judge.*

A true record. Attest:

JAMES W. TAYLOR, *Clerk.*

65 You will cause the deposition of witnesses to be signed by them. At the foot thereof you will add a certificate, subscribed by yourself, stating that the same were sworn to and subscribed by said witnesses, and the time and place where the same were taken, which said examination of witnesses so taken, with your certificate thereto attached, you will send, directed to our clerk of our said district court of the United States, for the district of Minnesota, at Saint Paul, in said district, sealed, with the names of the parties litigant endorsed thereon, on or before the first Monday of October next, together with this writ.

Witness the Hon. Rensselaer R. Nelson, judge of our said [SEAL.] court, at St. Paul, in said district, this 3d day September, A. D. 1861, and of our independence the 86th.

JAMES W. TAYLOR, *Clerk.*

66 District court of the United States, district of Minnesota, ss:

GARDNER P. DRURY
*vs.*
THOMAS FOSTER and HANNAH C. FOSTER. } Bill.

THOMAS FOSTER and HANNAH C. FOSTER
*vs.*
GARDNER P. DRURY. } Cross-bill.

DISTRICT OF MINNESOTA, *ss:*

And now, to wit, this (27th) twenty-seventh day of August, anno Domini eighteen hundred and sixty-one, before George W. Prescott, commissioner in the above causes, at the office of Allis & Peckham, Saint Paul, in said district, come the above parties, by their respective counsel, and thereupon the plaintiff in the cause first above entitled, by his counsel, puts in evidence the papers hereto an-
67 nexed, marked Exhibit I, II, III, IV, V, respectively, which are admitted by defendant's counsel to be the notes described in plaintiff's bill of complaint, and in defendant's answer thereto, and also in the cross-bill in the cause secondly above entitled. Puts also in evidence the paper hereto annexed, marked Exhibit VI, which is by defendants admitted to be the mortgage referred to in the pleadings above mentioned.

Thereupon, A. M. Hayes is produced as a witness on behalf of the plaintiff, and being by said commissioner first duly sworn, deposes and says, in answer to interrogatories:

I. Are you acquainted with the defendants in this cause, and the grantors in the mortgage shown you? (Exhibit VI here shown to witness.) And if so, how long have you known them?

Answer. I am. I have known them five or six years.

68 II. Examine the signature "A. M. Hayes," purporting to be one of the witnesses to this mortgage, and state, if you know, whose signature that is; and if so, whose is it?

Answer. I do know. It is my signature.

III. State if that deed was signed and sealed in your presence by the parties purporting to have signed and sealed it?

Answer. It was.

IV. State if there was any other witness present beside yourself, when the deed was so signed and sealed?

Answer. James F. Dicken was present when the grantor, Hannah C. Foster, signed and sealed the deed, and Oren T. Hayes was present when the grantor, Thomas Foster, signed and sealed it.

V. Are the two signatures, purporting to be those of James F. Dicken and Oren T. Hayes, witnesses to the deed, the signatures of those two persons, to your knowledge?

Answer. They are.

VI. Did they witness it in your presence, after the signing and sealing by the grantors?

69 Answer. They did.

VII. Do you know where James F. Dicken, one of the witnesses to this deed, is?

Answer. I do not.

VIII. Do you know if James F. Dicken is in the State of Minnesota at the present time, or if he has been in this State within the past five or six months?

Answer. I do not.

IX. After the execution of this deed, as you have mentioned, to whom was it delivered?

Answer. It was delivered to me.

X. Do you recollect to whom you delivered it?

Answer. I think I delivered it to Thomas Foster, one of the grantors. That is my impression. But I cannot state, positively, whether it was delivered by me, or by brother. I can't recollect exactly how it went out of my hands.

XI. Examine the acknowledgment on this deed, and state, if you know, whose signature is affixed to the acknowledgment?

70 Answer. It is my signature.

XII. Were you a notary public at that time?

Answer. I was.

XIII. Was the seal after your name upon this instrument your official seal at that time?

Answer. It was.

XIV. Was this acknowledgment, to which your name and official seal is annexed, made before you at the time it purports to have been made?

Answer. It was.

XV. Were you requested by the grantors to witness their signing and sealing of the deed at the time you witnessed it?

Answer. I can't say whether I was directly asked; but it was done in their presence, and at their implied request.

*Cross-examination by defendants' counsel.*

X Ex. I. Where did you live at the time of signing and sealing Exhibit "VI"?

Answer. I lived in Hastings, Dakota county, in this State.

X Ex. II. Where did Thomas Foster and Hannah C. Foster live at that time?

71 Answer. They lived in said Hastings.

X Ex. III. Where was that instrument signed and sealed?

Answer. In said Hastings.

X Ex. IV. Was it signed and sealed by both the grantors at the same time, and in the same place?

Answer. It was signed and sealed by both on the same day; but Thomas Foster signed and sealed it at my office, and Hannah C. Foster signed and sealed it at the dwelling-house of Thomas Foster.

X Ex. V. Which signed and sealed first?

Answer. Thomas Foster.

X Ex. VI. By whom was it taken to the dwelling for Mrs. Foster to sign?

Answer. By me.

X Ex. VII. After she signed it, what did you do with it?

Answer. I took it to my office.

X Ex. VIII. How long did you have it at your office after it was signed and sealed?

Answer. I think it was several days, because I think the Doctor, after he signed it, went to Saint Paul, and remained several

72 days. My recollection is not distinct about it. I mean Doctor Thomas Foster, one of the grantors.

X Ex. IX. Do you recollect whether you delivered it personally to Thomas Foster, or sent it by letter?

Answer. I do not.

X Ex. X. What was it left in your hands for?

Answer. It was left in my hands to deliver to Thomas Foster.

X Ex. XI. While it was in your hands, do you recollect Mrs. Foster calling upon you in regard to it?

Answer. I do not. I don't recollect of ever seeing her about it at all after she acknowledged it. Possibly, she might, but I have no recollection of it.

X Ex. XII. Did you subscribe your name to it as witness in Mrs. Foster's presence?

Answer. I think I did.

X Ex. XIII. Do you know in whose handwriting the written part of the deed is?

Answer. Part of it is in my handwriting, and part of it is in the handwriting of the defendant, Thomas Foster.

X Ex. XIV. Look at the words "Gardner P. Drury, of Massachusetts," in the fourth line, and state, if you know, whose handwriting it is.

73 Answer. I think it is Thomas Foster's handwriting, from what I know of his writing. I did not see him write it.

X Ex. XV. Look at the words "twelve thousand seven hundred and eighty-five $\frac{40}{100}$," on the fifth and sixth lines of the mortgage, and state, if you know, whose handwriting it is.

Answer. I think it is Thomas Foster's.

X Ex. XVI. Look at the words "Gardner P. Drury," in the twenty-first line, and state, if you know, whose handwriting they are in.

Answer. I think in Thomas Foster's.

X Ex. XVII. In whose handwriting are the words "twelve thousand seven hundred and eighty-five $\frac{40}{100}$," in the twenty-third line?

Answer. I think in Thomas Foster's.

X Ex. XVIII. In whose handwriting are the words "being five in number," in the twenty-fifth line?

Answer. I think in Thomas Foster's.

X Ex. XIX. In whose handwriting is the word "fifty," in the thirty-eighth line?

Answer. Thomas Foster's, I think.

74 X Ex. XX. Is there any other part of the deed in his handwriting, or in any other person's than yourself?

Answer. The word "notes," in lines twenty-five and thirty-one was written by me, all but the letter "s." The letter "s," in those two words, is the handwriting, I think, of Thomas Foster. The rest of the written portion of the body of the deed is in my handwriting.

X Ex. XXI. State, if you know, when the portions in the handwriting of Thomas Foster were written. (Objected to, as not being matter of X Ex., to any matters elicited in the examination-in-chief, and also as immaterial.)

Answer. I do not know.

X Ex. XXII. State, if you know, whether those portions were written before the signing and sealing.

(Objected to, as previous question; and, also, that the witness can't contradict his own certificate of acknowledgment on the deed.)

Answer. I think they were not.

X Ex. XXIII. Were they written before you delivered the deed to Thomas Foster, after the signing and sealing? (Objected to as above to last quest.)

Answer. They were not, I think. I am quite positive they were not.

75 X Ex. XXIV. When did you write the part of the deed that is in your handwriting? (Objected to, as above.)

Answer. On the 27th day of April, 1857.

X Ex. XXV. At the time this deed was signed, sealed, and acknowledged, what did Mrs. Foster say about it, if anything? (Objected to, as above.)

Answer. She said something like this: That she was fearful the

speculation the Doctor was going into would not come out right; that she did not like to mortgage that place; but that the Doctor wanted to raise a few hundred dollars, or several hundred dollars, or something to that effect—I don't recollect the exact expression she used; and that she did not like to refuse him, so she consented to sign the mortgage. That is the amount of what she said, but I don't recollect her language. I state, as nearly as I can remember, what she said, so as to give the meaning she conveyed. (This testimony objected to, so far as it is intended to offer declarations of defendant, Mrs. Foster, in evidence.)

76 *Re-direct ex. by plaintiff.*

R. D. I. Do you recollect whether you gave the deed to defendant, Thomas Foster, at all?

Answer. I think I gave it to him myself, but am not positive.

A. M. HAYES.

Subscribed and sworn to before me, this 27th August, A. D. 1861.

GEO. W. PRESCOTT, *Commissioner.*

And thereupon plaintiff puts in evidence mortgage deed hereto annexed, marked Exhibit VI. Also offers in evidence the acknowledgment upon it, and the register of deeds certificate endorsed upon it. And defendant admits that same was recorded according to said certificate upon the back.

Plaintiff rests.

And thereupon defendants introduce their testimony, as follows:

Erastus S. Edgerton, being first duly sworn, says:

I. Do you know the parties in this suit?

Answer. I know the parties to this suit, Gardner P. Drury
77 and Thomas Foster; do not recollect as I know, Hannah C. Foster.

II. Did you know Mr. Foster and Mr. Drury in the spring of 1857?

Answer. I think I did; I would not be positive what year.

III. Look at this mortgage and these notes. (Exhibit from I to VI, inclusive, heretofore put in evidence, shown witness.) Did you know them at the time this loan evidenced by these notes and mortgage was negotiated?

Answer. I knew Gardner P. Drury and Thomas Foster. I don't remember that I knew Mrs. Foster. If I ever did. I have forgotten it.

IV. Did you act for either of the parties in negotiating the loan?

Answer. I assisted both parties more or less.

V. Were you present when the papers were delivered?

Answer. I don't recollect; wouldn't be positive. I may and may not have been.

VI. How long had Mr. Drury been here that spring, at the time these papers were delivered?

78 Answer. A few days; don't remember how many.

VII. Do you recollect the fact of this writing being written and signed? (Guaranty purporting to be signed by Alex. Ramsey on the back of Exhibit VI, shown witness. Objected to by Pl'ff Drury's counsel as being impertinent and immaterial.)

Answer. I think I do. (Objected to as not responsive to the question.)

VIII. Do you know how long they were negotiating the loan before the papers were delivered? (Objected to as impertinent and immaterial.)

Answer. A few days; I cannot tell how many.

IX. Was this paper, Exhibit VI, in your possession during any of the time?

Answer. I cannot tell.

X. Do you know in whose handwriting the body of these notes is, (Exhibit I to VI?)

Answer. I think it is the handwriting of H. M. Ketcham, who was clerk for me at that time.

XI. Where was the loan negotiated?

Answer. I do not know positively. I recollect Mr. Drury's

79 going to Hastings, and that's the way I recollect they were a few days negotiating the loan. And I recollect they were in my office, but I couldn't say where it was negotiated.

XII. Do you know what he went to Hastings for?

Answer. I understood he went to look at the property which he was to take a mortgage of. I understood it from Drury or Thomas Foster.

XIII. Were you told that during the negotiation?

Answer. I should think so. Yes.

XIV. How long after that was the negotiation consummated by the delivery of the papers?

Answer. I can't recollect; the whole thing is indistinct with me.

XV. Do you recollect taking or sending this (Exhibit VI) for record?

Answer. I do not.

XVI. Did you see this mortgage before the negotiations were completed?

Answer. I may and may not; can't tell.

80 XVII. Did you see the notes before they were negotiated?

Answer. I don't know anything about it; the only thing I know about it is, they are in the handwriting of my clerk.

XVIII. What did you do in assisting the parties in making the loan?

Answer. I had been spoken to in the first place by Thomas Foster, to assist him about getting money. This was before Gardner P. Drury came here, or before I knew he had money, at all events, for I had tried to get the money of others before Drury spoke to me. Then Gardner P. Drury spoke to me, to know who wanted to hire

money. I told Thomas Foster that Gardner P. Drury wanted to lend, and told Drury that Foster wanted to hire. That's the substance.

XIX. Is that all you did?

Answer. I probably had conversation with both porties, but can't give the details.

XX. While the negotiation was going on, did you hear anything said between Foster and Drury about the blanks in the mortgage?

Answer. I did not.

81 XXI. Did you hear any conversation in the presence of Mr. Drury in regard to any blanks in it?

Answer. I don't recollect that I did.

XXII. Do you recollect whether this guaranty was written before the delivery of the notes and mortgage? (Objected to as impertinent and irrelevant, and that there is no guaranty in evidence.)

Answer. I think it was written before; yet I am not very positive about it.

XXIII. Do you recollect when the money was advanced?

Answer. I do not. It seems strange that I do not, for it is most reasonable to suppose that I should have cashed Drury's drafts, and yet I have not the most distant recollection of it.

XXIV. Were you informed by any person that this mortgage was signed and sealed with the name of the mortgagee, and the amount in blank before the delivery of it? (Objected to as indefinite and uncertain; also as impertinent, immaterial and incompetent evidence.)

Answer. I was.

XXV. State who informed you, and what that information was? (Objected to for same reasons as above.)

82 Answer. Thomas Foster. The information was, that he had bro't up a mortgage from home executed in blank, and that he was authorized to fill it out.

XXVI. Did you make any other loan for Foster during that spring? (Objected to as immaterial.)

Answer. Not that I recollect.

XXVII. Is this book your original book of entry of your daily transactions in spring of 1857? (Book shown witness.) (Objected to as indefinite, immaterial, and incompetent evidence.)

Answer. It is the original book of entry of the daily transactions of Macubin & Edgerton.

XXVIII. That was the name of your firm, engaged in the banking business, was it?

Answer. It was.

Defendants, by their counsel, here offer in evidence from such book of entry, the entry under date of May 22, 1857, in the following words and figures:

"Profit and loss. Com. chg'd Foster for loan, 100."

(Admission objected to as incompetent and immaterial.)

*X Examined by plaintiff's counsel.*

83 X Ex. I. Did you charge a commission to either Drury or Foster for the negotiation of this loan?

Answer. I have no recollection of charging any, except from this book.

X Ex. II. According to that book, you charged the defendant, Foster, a hundred dollars for the negotiation of this loan, did you not?

Answer. So it appears from this book. I had forgotten it.

X Ex. III. And according to that book, the defendant, Thomas Foster, paid you a hundred dollars for negotiating that loan, did he not?

Answer. He did.

X Ex. IV. Did Drury pay you anything, or did you charge him anything, for negotiating this loan?

Answer. I do not recollect of charging him anything, or of his paying anything.

X Ex. V. Do you find any charge, entry, or memorandum in that book of Mr. Drury's, paying you anything, or of his being
84 charged anything by you, for negotiating this loan?

Answer. I do not.

X Ex. VI. Have you examined the book for the purpose of finding such charge?

Answer. I have examined the book, and do not find the name of Mr. Drury.

X Ex. VII. You have that book now before you, have you not?

Answer. I have. It is the cash book of Mackubin & Edgerton, and commences July 9th, 1856, and terminates June 10th, 1857.

X Ex. VIII. Is the entry or memorandum which has been given in evidence from that book by defendant's counsel in your handwriting?

Answer. It is not.

X Ex. IX. Is the entry which has just been given in your handwriting?

Answer. It is not.

X Ex. X. Have you any recollection of that entry, or the matter of that entry, independent of this book?

Answer. Nothing except what that brings to my mind. I don't recollect about the entry, nor the fact of the entry, until I saw it in this book.

85 X Ex. XI. Have you any recollection of this entry being made independent of the book?

Answer. I have not.

ERASTUS J. EDGERTON.

Subscribed and sworn to before me this 27th August, A. D. 1861.

GEO. W. PRESCOTT, *Commissioner.*

Defendants' counsel also offers in evidence the guaranty on the back of mortgage marked Exhibit VI, which guaranty is marked Exhibit VII. And thereupon the said several parties in the said causes first above entitled declared that they had no more testimony to produce before me, the said commissioner heretofore named, and I accordingly return the foregoing testimony as the whole of the testimony in connection with the exhibits therein testified to, and heretofore annexed, introduced by said parties.

I certify, also, that the said parties plaintiff and defendants,
86 by their counsel, appeared before me, at the time and place, and in all respects as set forth, pursuant to stipulation, and that the foregoing interrogatories and cross-interrogatories were proposed by the counsel for the several parties, as above set forth, and were by me reduced te writing, as they were severally propounded. That the answers of the witnesses were also by me reduced to writing, as they were given to the said interrogatories and cross-interrogatories; that the questions and answers were then by me read to the witnesses, and were thereupon signed by them; and that said witnesses were, previous to testifying, each duly sworn in said cause to depose the whole truth, and nothing but the truth.

To all which, witness my hand this twenty-seventh day of August, A. D. 1861.

GEO. W. PRESCOTT, *Commissioner.*

Commissioner's fees, $5.

87 *Exhibit I.*

$1,062$\frac{50}{100}$ SAINT PAUL, *April 27th*, 1857.

On the twenty-seventh day of May, 1858, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand sixty-two and $\frac{50}{100}$ dollars; if not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid. Payable in Saint Paul, with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed on the back: "Gardner P. Drury."

STATE OF MINNESOTA,
*Ramsey County, ss:*

On the day of the date hereof, I, Delos A. Monfort, notary public, residing in the city of Saint Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed at the office of the maker of said note, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note,
88 and all others concerned, for all exchange, re-exchange, costs,

damages, and interest, suffered and to be suffered, for want of payment thereof.

And I do further certify that on the day of the date hereof, I served notices of the presentment and demand of payment of the said note, and of the protest thereof, as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office in , directed to them, at their reputed place of residence, and directed to the post office nearest to reputed place of residence, as follows:

On Thomas Foster, directed to him at Saint Paul.

On Gardner P. Drury, directed to him at Saint Paul.

On Alex. Ramsey, he having guaranteed the mortgage by which this note is secured, directed to him at Saint Paul.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office this twenty-seventh day of May, in the year one thousand eight hundred and fifty-eight.

D. A. MONFORT,

[SEAL.] *Notary Public, Minnesota.*

89 *Exhibit II.*

$1,062 50. SAINT PAUL, *April 27th*, 1857.

On the twenty-seventh day of May, 1859, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand sixty two and $\frac{50}{100}$ dollars; if not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid. Payable in Saint Paul, with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Gardner P. Drury.

STATE OF MINNESOTA,
*Ramsey County, ss:*

On the day of the date hereof, I, William Markoe, notary public, residing in the city of St. Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed to Thomas Foster personally, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said
90 note, and all others concerned, for all exchange, re-exchange, costs, damages, and interest, suffered and to be suffered for want of payment thereof. And I do further certify that on the day of the date hereof I served notices of the presentment and demand of payment of the said note, and of the protest thereof, as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office at St. Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Thomas Foster, directed to him at St. Paul, Minn.

On Gardner P. Drury, directed to him at St. Paul, Minn.

On Alexander Ramsey, as guarantor, in the mortgage, directed to him at St. Paul, Minn.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office this twenty-seventh day of May, in the year one thousand eight hundred and fifty-nine.

WILLIAM MARKOE,
[SEAL.] *Notary Public, Minnesota.*

91 *Exhibit III.*

$1,097\frac{90}{100}$. SAINT PAUL, *April 27th*, 1857.

On the twenty-seventh day of November next, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand ninety-seven and $\frac{90}{100}$ dollars; if not paid at maturity, to draw interest at the rate of twenty-five p'r cent. per annum until paid. Payable in Saint Paul, with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Pay to the order of Mackubin & Edgerton, St. Paul, Minnesota. Gardner P. Drury. Pay Gardner P. Drury or order, without recourse. Mackubin & Edgerton. "Gardner P. Drury."

MINNESOTA, *Ramsey County, ss:*

On the day of the date hereof, I, Delos A. Monfort, notary public, residing in the city of Saint Paul, by lawful authority duly
92 commissioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed to the maker of said note, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and all others concerned, for all exchange, re-exchange, costs, damages, and interest, suffered and to be suffered for want of payment thereof. And do further certify that on the day of the date hereof, I served notices of the presentment and demand of payment of the said note, and of the parties thereof, as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office in the city of St. Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Thomas Foster, directed to him at Saint Paul; on Gardner P. Drury, directed to him at Boston, Mass.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office this 27th day of November, in the year one thousand eight hundred and fifty-seven.

[SEAL.] D. A. MONFORT,
*Notary Public, Minnesota.*

93 *Exhibit IIII.*

$8,500\frac{00}{100}$. SAINT PAUL, *April 27th*, 1857.

Two years and one month from date, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury, eight thousand five hundred dollars; if not paid at maturity, to draw interest at the rate of twenty-five p'r cent. p'r annum until paid. Payable in Saint Paul, with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Gardner P. Drury.

STATE OF MINNESOTA,
*County of Ramsey, ss:*

On the day of the date hereof, I, William Markoe, notary public, residing in the city of St. Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed, to Thomas Foster, personally, where the same is made payable, and demanded payment thereof, which was refused.

94 Whereupon I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note and the guarrantor on the mortgage to secure the same, and all others concerned, for all exchange, re-exchange, costs, damages, and interest, suffered and to be suffered for want of payment thereof. And I do further certify that on the day of the date hereof, I served notices of the presentment and demand of payment of the said note, and of the protest thereof, as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office in St. Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Thomas Foster, directed to him at St. Paul, Minn.; on Gardner P. Drury, directed to him at St. Paul, Minn.; on Alexander Ramsey, as guarantor on the mortgage, directed to him at St. Paul, Minn.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this twenty-seventh day of May, in the year one thousand eight hundred and fifty-nine.

[SEAL.] WILLIAM MARKOE,
*Notary Public, Minnesota.*

95 *Exhibit V.*

$1,062\frac{50}{100}$. SAINT PAUL, *April 27th*, 1857.

On the twenty-seventh day of November, 1858, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand sixty-two and $\frac{50}{100}$ dollars; if not paid at maturity, to draw interest at the rate of twenty-five per cent. p'r annum until paid. Payable in Saint Paul, with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Pay to the order of E. S. Edgerton. Gardner P. Drury. Pay Gardner P. Drury, or order, without recourse to E. S. Edgerton. Gardner P. Drury.

STATE OF MINNESOTA,
*County of Ramsey, ss:*

On the day of the date hereof, I, Geo. H. Edgerton, notary public residing in the city of Saint Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof, the original note, hereto annexed, at the office of the said
96 Thomas Foster, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and all others concerned, for all exchange, re-exchange, costs, damages, and interest, suffered and to be suffered for want of payment thereof. And I do further certify that on the day of the date hereof, I served notices of the presentment and demand of payment of the said note, and of the protest thereof, as aforesaid, for nonpayment, on the following named persons, parties to said note, by depositing the same in the post office in the city of Saint Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Gardner P. Drury, directed to him at Boston, Mass.; on Alex. Ramsey, directed to him, Saint Paul, Minn.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office this twenty-seventh day of November, in the year one thousand eight hundred and fifty-eight.

GEO. H. EDGERTON,
*Notary Public, Minnesota.*

97 *Exhibit VI.*

This indenture, made this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and fifty-seven, between Thomas Foster and Hannah C. Foster, his wife, of the county of Dakota and Territory of Minnesota, parties of the first part, and Gardner P. Drury, of Massachusetts, party of the second part, witnesseth: That the said parties of the first part, in consideration of the sum of twelve thousand seven hundred and eighty-five $\frac{40}{100}$ dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns forever, all that tract or parcel of land lying and being in said county of Dakota, described as follows, to wit:

Lots six (6) and seven (7) and the southwest quarter of the southeast quarter of section No. twenty-seven, in township No. one hundred and fifteen north, of range No. seventeen west, in the Red Wing land district.

To have and to hold the same, together with all the heredita-

98 ments and appurtenances thereunto in anywise appertaining. And the said Thomas Foster and Hannah C. Foster, his wife, parties of the first part, do covenant with the said party of the second part, his heirs, and assigns, as follows: First, they are lawfully seized of said premises; second, that they have good right to convey the same; third, that the same are free from all incumbrances; and fourth, that the said party of the second part, his heirs and assigns, shall quietly enjoy and possess the same, and that they will warrant and defend the title to the same against all lawful claims.

Provided, nevertheless, that if the said Thomas Foster and Hannah C. Foster, his wife, parties of the first part, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said Gardner P. Drury, party of the second part, his executors, administrators, or assigns, the sum of twelve thousand seven hundred and eighty-five 40-100 dollars, according to the conditions of said Thomas Foster's promissory notes, being five in number, bearing even date herewith, then this deed to be null and void; other-
99 wise, to be in full force and effect. But if default shall be made in the payment of said sum of money, or the interest, or any part thereof, at the time hereinbefore specified for the payment thereof, the said parties of the first part, in such case, do hereby authorize and fully empower the said party of the second part, his heirs, executors, administrators, or assigns, to sell the said hereby granted premises at public auction and convey the same to the purchaser, in fee simple, agreeably to the statute in such case made and provided, and out of the moneys arising from such sale, to retain the principal and interest which shall then be due on the said notes, together with all the costs and charges, and pay the overplus (if any) to the said parties of the first part, their heirs, executors, administrators, or assigns.

And the said Thomas Foster and Hannah C. Foster, his wife, parties of the first part, do hereby further covenant and agree to and with the said party of the second part, his heirs, executors, administrators, and assigns, that they will pay all taxes and assess-
100 ments, of every nature, that may be assessed on said premises previous to the day appointed in pursuance of any law for the sale of lands for town, city, county, territorial, or State taxes, and that if the said party of the second part shall have occasion to and shall commence a foreclosure of this mortgage deed for condition broken, by a sale as above provided, there shall be taxed, allowed, and paid to the said party of the second part, an attorney or solicitor's fee of fifty dollars, in addition to the fees allowed by law.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THOMAS FOSTER. [SEAL.]
HANNAH C. FOSTER. [SEAL.]

Signed, sealed, and delivered in the presence of—

A. M. HAYES.
JAMES F. DICKEN.
OREN T. HAYES.

TERRITORY OF MINNESOTA,
*County of Dakota, ss:*

Be it known that on this twenty-seventh day of April, A. D. 1857, before me personally appeared Thomas Foster and Hannah C.,
101 his wife, the signers and sealers of the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes expressed.

And the said Hannah C. Foster, wife of the said Thomas Foster, being examined separate and apart from her said husband, and the contents of the foregoing deed made known to her by me, she then acknowledged that she executed the same freely and without fear or compulsion from any one.

A. M. HAYES, [SEAL.]
*Notary Public for Minnesota Territory.*

Mortgage deed.—Thomas Foster and wife to Gardner P. Drury.

OFFICE OF REGISTER OF DEEDS,
*County of Dakota.*

I hereby certify that the within deed was filed in this office for record on the twenty-fifth day of May, at 10 o'clock a. m., and was duly recorded in Book "D," Mgs., p. 188, 189, and 190.

JOHN KENNEDY,
*Register of Deeds.*

102 *Exhibit VII.*

For value received, I hereby guarantee that the property described in the within mortgage will sell for enough to pay the note and interest accompanying said mortgage, at any time said mortgage may be foreclosed after maturity.

ALEX. RAMSEY.

ST. PAUL, *May* 21, '57.

103 And afterwards, to wit, on the twenty-fifth day of April, in the year eighteen hundred and sixty-two, came the said plaintiff, Gardner P. Drury, by his said solicitors, and filed in the clerk's office of said court at St. Paul, his petition for appeal in the words and figures following, to wit:

GARDNER P. DRURY, plaintiff & appellant,
*vs.*
HANNAH C. FOSTER impleaded with THOMAS FOSTER & WILLIAM L. BANNING, defendant & appellee.
} In equity.

*To the honorable the Supreme Court of the United States:*

The petition of appeal of Gardner P. Drury, the above-named plaintiff and appellant, respectfully showest:

That heretofore, to wit, at the October term of the year A. D. 1861, of the district court of the United States for the district of Minnesota, a final decree was rendered by said court, sitting in equity, in a certain cause therein pending, wherein your petitioner
104 was plaintiff, and Thomas Foster, Hannah C. Foster, his wife, and William L. Banning were defendants; which said decree, so far it sustains the defence of the said defendant, Hannah C. Foster, in her said answer set forth, and as to her dismisses the plaintiff's bill out of court, is erroneous and ought to be reversed, as your petitioner is advised.

And that the matter thereby in dispute, exclusive of costs, exceeds the sum of two thousand dollars.

Wherefore this appellant appeals from the said decree of the said court, so far as the same is hereinabove complained of, to the Supreme Court of the United States, next to be holden at the city of Washington, in the District of Columbia, and prays that the said decree, and a transcript of the bill of complaint, answer, pleadings, depositions, evidence and all other proceedings of what kind soever in the said cause, may be duly transmitted to the said Supreme Court, and that said Supreme Court may receive, hear, and determine said appeal; and that so much of the said decree as is hereinabove complained of may be reversed, and that such other or further order and
105 decree may be made by the said Supreme Court in the premises as the nature of the case may require, and as may be agreeable to equity, and that this appellant may be restored to all things which he hath lost by the part of said decree above complained of, and may have all the relief which he hath prayed for in his said bill of complaint.

And this appellant will ever pray, &c.

HALE & BOND,
*Solicitors for Pl'ff.*
And ALLIS & PECKHAM, *of Counsel.*

And afterwards, to wit, on the twenty-fifth day of April, A. D. eighteen hundred and sixty-two, came the said plaintiff, by his said solicitors, and filed in the said clerk's office at St. Paul, the following order, to wit:

District court of the United States for the district of Minnesota.

GARDNER P. DRURY, plaintiff,
*vs.*
THOMAS FOSTER, HANNAH C. FOSTER, his wife, & WILLIAM L. BANNING, defendants. } In equity.

In this cause, this 25th day of April, A. D. 1862, came the plaintiff, by his solicitors, Messrs Hale and Bond, and exhibiting his
106 petition praying for an appeal to the Supreme Court of the United States next to be holden at the city of Washington, in the District of Columbia, on the first Monday of December, A. D. 1862, from so much of the final decree heretofore rendered in this

cause as in said petition is complained of, and showing that the matter in dispute exclusive of costs exceeds the sum of two thousand dollars, and furnishing the security required by law, moved that an appeal be allowed in accordance with the prayer of said petition; and thereupon it is ordered that the appeal prayed for be, and the same is hereby, allowed, and that the appellant serve the usual citation according to law.

R. R. NELSON,
*United States Judge.*

107 UNITED STATES OF AMERICA,
*District of Minnesota, ss:*

And now, to wit, at a stated term of the district court of the United States for the district of Minnesota, held at Saint Paul, on the first Monday in October, in the year eighteen hundred and sixty-two, on the first day of said term, it was ordered that the record in this cause, together with the others, be, and the same is hereby, transferred to the circuit court of the United States for the district of Minnesota, in pursuance of an act of the Congress of the United States approved July 15th, 1862, entitled an act to amend an act of the third of March, A. D. 1837, entitled an act supplementary to an act entitled an act to amend the judicial system of the United States.

108 UNITED STATES OF AMERICA,
*Circuit Court of the United States for the district of Minnesota, ss:*

I, H. E. Mann, clerk of said circuit court for the district of Minnesota, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing is a true and complete transcript of the record, process, pleadings, orders, final decree, and all other proceedings in said cause, and also of all the depositions, exhibits, and proofs, taken therein, as appears from the original records and files of said court. And I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith the original citation of appeal, together with the proof of the service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said circuit court, at Saint Paul, in the district aforesaid, this twenty-first day of November, in the year one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

H. E. MANN, *Clerk,*
By J. N. CARDOZO, *Deputy Clk.*

Filed Dec. 6, 1862.